THE ATTORNEY GENERAL OF HONGKONG

v.

ZAUYAH WAN CHIK & 3 ORS. & ANOTHER APPEAL

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' N.H. CHAN JCA
DATO' SITI NORMA YAAKOB JCA
[CIVIL APPEALS NOS. W-02-3 & W-02-9 OF 1994]
4 APRIL 1995

EVIDENCE: *Witnesses - Duty to answer relevant questions - Whether mandatory - Deposition of self-incriminating evidence - Whether could be refused - Common law rule against self-incrimination - Whether applicable - Evidence Act s. 132 (1).*

EVIDENCE: *Self-incriminating evidence - Witness compelled by law to give self-accusing evidence - Consequences - Whether evidence capable of founding a separate criminal liability - Whether witness exposed to civil liability - Evidence Act 1950 s. 132 (2).*

BANKING & FINANCE: *Confidential information - Bank officers compelled by Court order to disclose confidential information for special cause - Disclosure thereof - Whether a breach of confidence - Whether a statutory offence - Whether officers protected from prosecution - Bankers Books (Evidence) Act 1949 s. 6 - Banking and Financial Institutions Act 1989 ss. 97 & 100 - Evidence Act 1950 s. 132.*

PRIVATE INTERNATIONAL LAW: *Foreign tort - Civil liability - Scope - Whether an action would lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia - Evidence before foreign Court - Witness compelled by law to give self-accusing evidence in foreign Court - Whether criminal liability would lie against witness in Malaysia.*

The appellant, the Attorney General of Hong Kong, wanted some witnesses from Malaysia to give evidence in the Court of that colony, in respect of certain criminal proceedings there. Letters of request were issued for the purpose by the Supreme Court of Hong Kong, and following that, the High Court at Kuala Lumpur, acting under Ors. 66 & 39 of the Rules of the High Court 1980, proceeded to record evidence from several potential witnesses. The first and the second respondents, the officers of the third respondent bank, were two of these witnesses.

Pursuant to the proceedings, the learned Judge made an order under s. 6 of the Bankers Books (Evidence) Act 1949 (BBEA), ordering that the first respondent make disclosures upon a number of matters. The first to the third respondents, however, were fearful that by obliging the order they would contravene s. 97(1) of the Banking and Financial Institutions Act 1989 (BAFIA) and hence would expose themselves to possible prosecution thereunder. They were also concerned that in the course of giving evidence they might have to disclose information for which they could be civilly liable.

In consequence the respondents applied to the learned Judge for a declaration that the order of Court aforesaid would operate to exempt them from contravening s. 97(1) of BAFIA, or breaching their duties of confidentiality when giving evidence in Hong Kong. The learned Judge, in a clear exercise of discretion, ruled that the protection given by s. 6 of BBEA, or ss. 97(2) & 100 of BAFIA, would only operate within the territorial limits of the Court's jurisdiction and therefore, would not protect the respondents if they decide to give evidence in Hong Kong. The appellant, dissatisfied with the decision, appealed.

Before the appeal Court the primary issue that arose was whether the respondents were dutybound in law to give evidence as required, and if so, whether the disclosure of confidential information, if made by them in the proceedings in Hong Kong, could expose them to any liability in Malaysia.

Held: Per Gopal Sri Ram JCA (N.H Chan, Siti Norma Yaakob JJCA concurring)

[1] The trial Judge's ruling in this case is bound to produce an incongruent result. By that ruling, the respondents would not be liable civilly or criminally if they were to give evidence upon a matter before the recording Judge in this country. Likewise no liability would be attached if their depositions taken here are read out to a jury in Hong Kong. Yet if they appear in person before the very same jury and give *viva voce* evidence upon the same matters and even repeat *ipsissima verba* the very same answers given in their respective depositions, they are liable to be sued and prosecuted. Such a result will not follow if the correct approach is adopted.

[2] Section 132 of the Evidence Act 1950 has excluded the operation of the common law doctrine of privilege against self-incrimination. It follows therefore that the respondents are not excused, while giving evidence before the learned Judge, from declining to answer any relevant question asked of them. However, once it appears to the learned Judge that the answer to any particular question may result in one or more of the consequences described in s. 132(1), he must carry out the exercise set out in subsection (3) thereof. In this way neither the first, second nor the third respondent may be held criminally liable for the answers they provide, whether in examination in chief or under cross examination.

[3] It is inconceivable that a different result would ensue if the respondents were to give evidence in Hong Kong upon those matters covered by the letters of request. Section 97 of BAFIA is not expressed to have extra territorial effect and therefore a disclosure made in contravention of it cannot found the basis of criminal liability in this country. In any case, any answer given by them before the Court in Hong Kong will be governed by the law of that colony where the rule against self incrimination applies to protect them from criminal liability.

[4] The first to the third respondents have legitimate excuse or reason for breaking confidence because they were bound by law to make the disclosure. No action therefore will lie against them in respect of the disclosure by them of confidential information made in the course of giving evidence before the learned Judge in this country.

[5] In order to render an alleged breach of confidence that occurs abroad to be actionable in this country, two conditions must be satisfied. First, it must be actionable if the particular disclosure was made in Malaysia in the same circumstances in which it was made in the foreign country. Secondly, the disclosure of the confidential information of which complaint is made must not be justifiable by the law of the country in which the alleged breach of confidence occured.

[6] Any action brought by a putative plaintiff against the respondents complaining about the latters' disclosure of confidential information before the Courts of Hong Kong is doomed to failure because any such plaintiff will be unable to satisfy the first of the two requirements aforesaid. Put it simply it cannot be established in any such action that the disclosure complained of, if made here will be actionable under the *lex fori*. The disclosure by the first or second respondent of confidential information made before the Court of Hong Kong would not therefore expose them to any action for breach of confidence.

[7] The jurisdiction of a Malaysian Court to grant declaratory relief springs from two sources, namely, s. 41 of the Specific Relief Act 1950 and the Court's inherent jurisdiction. However, in an appeal such as the present, where relief is granted or withheld in the exercise of discretion, the initial function of the Court of Appeal is one of review only. It is only after an appellant has demonstrated that the High Court has erred in principle or that it has taken into account irrelevant considerations or failed to take into account relevant considerations or that the decision has occasioned a miscarriage of justice, that this Court becomes seised of an original discretion of its own.

[8] The instant case is one which falls within those categories in which this Court may exercise an original discretion. On the facts it is clear that if discretion is exercised against the appellant it would produce an unjust result. The prosecution and the defence in the Hong Kong proceedings would be deprived of presenting relevant evidence before the jury. That in itself is a compelling reason to exercise discretion in favour of the appellant.

Per N.H Chan JCA.

[1] By subsection (1) of s. 132 of the Evidence Act 1950, a witness in this country is bound to answer any relevant question put to him, whether in examination in chief, cross examination or re-examination. The legislature has thus taken away the common law privilege of not answering on the ground of self-incrimination.

[2] Although a witness can be compelled by the Court to answer to the questions put to him notwithstanding that such answers may criminate him, by subsection (2) of s. 132, any such answer will not subject him to arrest or prosecution except a prosecution for giving false evidence by that answer. By giving evidence before a Judge in this country under the letters of request, the witness, therefore, is protected by s. 132(2) from arrest or prosecution. It follows that those answers which have been protected under s. 132(2), if repeated in a Court of the country which issued the letters of request, would be similarly protected as though the evidence was taken in this country. This is because those answers had originated in this country where the protection afforded by the subsection applies.

[3] Section 132(2) only protects the witness from the consequences of giving incriminating evidence in criminal proceedings but not in respect of civil proceedings. The answers are therefore admissible in civil proceedings brought against the witness. However, in the instant case, the answers are not going to be of a kind or nature that will admit of any personal liability either in contract or in tort against the witnesses, and therefore there is no risk of any civil proceeding being brought against the witnesses because of those answers.

[4] In any case the witnesses in the present case have legitimate excuse or reason for breaking confidence because, at the time when the questions were put to them, they were bound by law, namely s. 132(1) of the Evidence Act, to make the disclosure. As the law stands, where the disclosure is made in obedience to the law which required it to be made, no duty of confidence arises.

[Appeal allowed. Declaration sought for granted as amended].

[Bahasa Malaysia Translation of Headnotes]

KETERANGAN: *Saksi-saksi - Kewajipan untuk menjawab soalan-soalan yang relevan - Samada mandatori - Pemberian keterangan yang menyalahkankan diri sendiri - Samada boleh ditolak - Penolakan keterangan menyalahkan diri oleh kaedah common law - Samada terpakai - Akta Keterangan s. 132(1).*

KETERANGAN: *Keterangan menyalahkan diri - Saksi dipaksa oleh undang-undang untuk memberikan keterangan yang menuduh diri sendiri - Akibat - Samada keterangan berkeupayaan mengasaskan satu liabiliti jenayah yang berasingan - Samada saksi terdedah kepada tanggungan sivil - Akta Keterangan 1950 s. 1950 132(2).*

KEWANGAN & PERBANKAN: *Maklumat sulit - Pegawai-pegawai bank dipaksa oleh perintah Mahkamah untuk mendedahkan maklumat sulit bagi satu tujuan khas - Pendedahan - Samada melanggar tanggungjawab untuk berahsia - Samada satu kesalahan statutori - Samada pegawai-pegawai terlindung daripada pendakwaan - Akta (keterangan) Buku-buku Jurubank, 1949 s.6 - Akta Institusi Kewangan dan Perbankan 1989 ss. 97 & 100 - Akta Keterangan 1950 s. 132.*

UNDANG-UNDANG ANTARABANGSA PERSENDIRIAN: *Tort Asing - Tanggungan Sivil - Skop - Samada sesuatu tindakan boleh diambil di Malaysia atas satu kesalahan yang dikatakan dilakukan di sebuah negeri di luar Malaysia - Keterangan di hadapan Mahkamah asing - Saksi dipaksa oleh undang-undang untuk memberikan keterangan yang menuduh diri sendiri di Mahkamah asing - Samada liabiliti jenayah boleh diambil terhadap saksi di Malaysia.*

Perayu, Peguam Negara Hong Kong, menghendakkan beberapa saksi daripada Malaysia untuk memberi keterangan dalam Mahkamah tanah jajahan tersebut, berhubung dengan beberapa prosiding jenayah di sana. Surat-surat permintaan telah dikeluarkan bagi tujuan tersebut oleh Mahkamah Agung Hong Kong, dan berikutan itu, Mahkamah Tinggi di Kuala Lumpur, bertindak di bawah Aturan-Aturan 66 & 39 Kaedah-Kaedah Mahkamah Tinggi, 1980 terus mencatatkan keterangan daripada beberapa saksi yang berpotensi. Responden pertama dan kedua, yang merupakan pegawai-pegawai bank responden ketiga, adalah dua daripada saksi-saksi ini.

Selaras dengan prosiding-prosiding ini, Tuan Hakim yang bijaksana telah membuat perintah di bawah s. 6 Akta (Keterangan) Buku-buku Jurubank 1949 (BBEA), memerintahkan supaya responden pertama membuat pendedahan atas beberapa perkara. Responden-responden pertama hingga ketiga, namun begitu, berasa bimbang bahawa dengan mematuhi perintah tersebut mereka akan melanggari s. 97(1) Akta Institusi Kewangan dan Bank 1989 (BAFIA) dan dengan itu mungkin mendedahkan diri mereka kepada pendakwaan di bawahnya . Mereka juga berasa bimbang bahawa dalam memberikan keterangan, mereka mungkin terpaksa mendedahkan maklumat yang menyebabkan mereka bertanggungjawab secara sivil.

Akibat daripada itu responden-responden tersebut telah memohon kepada Tuan Hakim yang bijaksana untuk satu pengisytiharan bahawa perintah Mahkamah sepertimana yang tersebut di atas akan berfungsi untuk mengecualikan mereka daripada melanggari s.97(1) BAFIA, atau memungkiri kewajipan-kewajipan mereka terhadap kerahsiaan ketika memberi keterangan di Hong Kong. Tuan Hakim yang bijaksana, dalam melaksanakan budibicaranya, memutuskan bahawa perlindungan yang diberikan oleh s. 6 BBEA, atau ss. 97(2) & 100 BAFIA, akan hanya berfungsi dalam lingkungan had wilayah bidang kuasa Mahkamah dan dengan itu, tidak akan melindungi responden jika mereka memutuskan untuk memberi keterangan di Hong Kong. Perayu oleh kerana tidak berpuas hati telah merayu.

Di hadapan Mahkamah Rayuan isu utama yang timbul adalah sama ada responden-responden tersebut terikat kepada kewajipan di sisi undang-undang untuk memberikan keterangan sepertimana yang dikehendaki, dan jika demikian, sama ada pendedahan maklumat sulit, jika di buat oleh mereka dalam prosiding di Hong Kong, boleh mendedahkan mereka kepada apa-apa liabiliti di Malaysia.

Diputuskan: Per Gopal Sri Ram HMR (N.H. Chan, Siti Norma Yaakob HMR menyetujui):

[1] Keputusan Hakim perbicaraan dalam kes ini akan menghasilkan jawapan yang tidak seimbang. Menerusi keputusan itu, responden tidak akan bertanggungan secara sivil atau jenayah jika mereka memberikan keterangan ke atas satu perkara di hadapan Hakim dalam negeri ini. Begitu juga tanggungan atau liabiliti tidak berbangkit jika deposisi-deposisi mereka yang dikeluarkan di sini dibaca dihadapan juri di Hong Kong. Bagaimanapun jika mereka hadir sendiri di hadapan juri yang sama dan memberikan keterangan *viva voce* ke atas perkara yang sama dan bahkan mengulangi *ipsissima verba* jawapan-jawapan yang sama yang diberikan dalam deposisi-deposisi masing-masing, mereka boleh didakwa. Keputusan yang sedemikian tidak akan menuruti jika pendekatan yang betul diterimapakai.

[2] Seksyen 132 Akta Keterangan 1950 telah menolak pemakaian doktrin common law memberi perlindungan terhadap keterangan yang menyalahkan diri. Ianya dengan itu menurut bahawa responden tidak dikecualikan, ketika memberikan keterangan di hadapan Hakim yang bijaksana, daripada enggan menjawab soalan-soalan yang relevan yang ditujukan kepada mereka. Bagaimanapun, sebaik sahaja ianya kelihatan kepada Hakim yang bijaksana bahawa jawapan kepada mana-mana soalan mungkin menyebabkan akibat-akibat atau mana-mana akibat yang diterangkan dalam s. 132(1), beliau mestilah menjalankan kuasanya seperti yang diperuntukkan dalam seksyen-kecil (3) di situ. Menurut cara ini responden pertama, kedua mahupun ketiga tidak akan dikenakan prosiding jenayah bagi jawapan-jawapan yang mereka berikan, sama ada dalam pemeriksaan utama atau di bawah pemeriksaan balas.

[3] Ianya tidak dapat dibayangkan bahawa satu keputusan yang berlainan akan timbul jika responden memberikan keterangan di Hong Kong ke atas perkara-perkara yang dirangkumi oleh surat-surat permintaan tersebut. Seksyen 97 BAFIA tidak mempunyai kesan luar wilayah dan dengan itu pendedahan yang dibuat yang melanggarinya tidak boleh menjadi asas bagi tanggungan jenayah dalam negeri ini. Dalam apa keadaan pun, mana-mana jawapan yang diberikan oleh mereka di Mahkamah Hong Kong akan dikuasai oleh undang-undang tanah jajahan tersebut di mana "rule against self-incrimination" terpakai bagi melindungi mereka daripada liabiliti jenayah.

[4] Responden-responden pertama hingga ketiga mempunyai alasan yang sah bagi membuka rahsia kerana mereka terikat oleh undang-undang untuk membuat pendedahan tersebut. Dengan itu tidak terdapat apa-apa tindakan terhadap mereka berhubung dengan pendedahan maklumat-maklumat sulit oleh mereka yang telah dibuat dalam proses memberikan keterangan di hadapan Hakim yang bijaksana di negeri ini.

[5] Dua syarat harus dipenuhi sebelum suatu "breach of confidence" yang berlaku di luar negeri boleh diambil tindakan dalam negeri ini. Pertama, ia haruslah boleh diambil tindakan jika pendedahan itu dilakukan di Malaysia dalam keadaan yang sama dalam mana ianya telah dibuat di negeri asing itu. Kedua, pendedahan maklumat sulit terhadap mana aduan telah dibuat, haruslah tidak berjustifikasi mengikut undang-undang negeri di mana "breach of confidence" itu dikatakan telah berlaku.

[6] Mana-mana tindakan yang dibawa oleh seorang plaintif putatif terhadap responden mengadukan tentang pendedahan maklumat sulit oleh responden di Mahkamah Hong Kong akan pasti gagal kerana plaintif yang sedemikian tidak akan dapat memenuhi kehendak pertama daripada dua kehendak-kehendak di atas. Secara nyatanya, ianya tidak dapat ditentukan, dalam mana-mana tindakan yang sedemikian, bahawa pendedahan yang diadukan itu, jika dibuat di sini boleh diambil tindakan di bawah *lex fori*. Pendedahan maklumat sulit oleh responden pertama atau kedua, jika dibuat di Mahkamah Hong Kong, dengan itu tidak akan mendedahkan mereka kepada mana-mana tindakan bagi "breach of confidence".

[7] Bidang kuasa Mahkamah Malaysia untuk memberikan relief pengisytiharan berpunca daripada dua sumber, iaitu s. 41 Akta Relief Spesifik 1950 dan bidang kuasa Mahkamah yang sedia ada. Walaupun demikian, dalam rayuan seperti yang terdapat kini, di mana relief diberikan atau ditahan sewaktu melaksanakan budibicara, fungsi asas Mahkamah Rayuan adalah hanya untuk mengkaji-semula. Budibicara sedia ada Mahkamah Rayuan akan hanya wujud setelah perayu menunjukkan bahawa Mahkamah Tinggi telah tersalah pada dasarnya, atau telah mengambil kira pertimbangan tidak relevan, atau gagal mengambil kira pertimbangan yang relevan, atau pun telah membuat keputusan yang menyebabkan salah laksana keadilan.

[8] Kes semasa ini adalah suatu kes yang tergolong dalam kategori di mana Mahkamah ini boleh melaksanakan budibicara asalnya. Berdasarkan fakta-fakta, ianya jelas bahawa jika budibicara dilaksanakan terhadap perayu ianya akan menghasilkan keputusan yang tidak adil. Pihak pendakwaan dan pembelaan dalam prosiding Hong Kong akan dilucut hak untuk mengemukakan keterangan yang relevan di hadapan juri. Hal ini dengan sendirinya menjadi alasan yang mendesak untuk melaksanakan budibicara yang memihak kepada perayu.

Per N.H. Chan HMR:

[1] Melalui seksyen-kecil (1) s. 132 Akta Keterangan 1950, seseorang saksi di negeri ini terikat untuk menjawab apa-apa soalan relevan yang dikemukakan kepadanya, sama ada dalam pemeriksaan utama, pemeriksaan balas atau pemeriksaan semula. Badan perundangan telah dengan itu menarik hak istimewa yang diberikan oleh common law untuk tidak menjawab atas alasan keterangan tersebut akan mempersalahkan diri sendiri.

[2] Walaupun seseorang saksi boleh dipaksa oleh Mahkamah untuk menjawab soalan-soalan yang dikemukakan kepadanya tanpa menghiraukan bahawa soalan-soalan yang sedemikian boleh menyalahkannya, melalui seksyen-kecil (2) s. 132, mana-mana jawapan yang sedemikian tidak akan menyebabkan saksi tersebut ditahan atau didakwa melainkan bagi pendakwaan kerana memberikan keterangan palsu melalui jawapan itu. Dengan memberikan keterangan di hadapan seorang Hakim di negeri ini atas surat permintaan yang berkenaan, saksi tersebut, dengan itu, adalah dilindungi oleh s. 132 (2) daripada tangkapan atau pendakwaan. Ianya mengikut bahawa jawapan-jawapan yang dilindungi di bawah s. 132 (2) itu, jika diulangi dalam Mahkamah dari mana surat permintaan berkenaan dikeluarkan, akan menjadi terlindung seperti itu juga, seolah-olah keterangan itu telah diberikan dalam negeri ini. Ini adalah kerana jawapan-jawapan itu berasal dari negeri ini di mana perlindungan yang diperuntukkan oleh seksyen-kecil itu terpakai.

[3] Seksyen 132 (2) hanya melindungi saksi daripada akibat yang akan diterima atas memberi keterangan yang menyalahkan diri dalam prosiding jenayah tetapi tidak dalam prosiding sivil. Jawapan-jawapan tersebut dengan itu boleh diterima dalam prosiding sivil yang di bawa terhadap saksi tersebut. Bagaimanapun, dalam kes semasa ini, jawapan-jawapan tersebut tidak bersifat atau merupakan jenis yang mengakui apa-apa liabiliti diri, sama ada dalam kontrak atau tort, terhadap saksi, dan dengan itu tidak terdapat risiko apa-apa prosiding sivil akan di bawa terhadap saksi-saksi tersebut yang disebabkan oleh jawapan-jawapan itu.

[4] Dalam apa-apa keadaan pun saksi-saksi dalam kes semasa ini mempunyai alasan yang sah kerana membuka rahsia kerana, pada waktu soalan-soalan tersebut dikemukakan kepada mereka, mereka terikat oleh undang-undang, iaitu s. 132 (1) Akta Keterangan, untuk membuat pendedahan itu. Kedudukannya di sisi undang-undang ialah, jika pendedahan dibuat kerana mematuhi kehendak undang-undang, yang menghendakki pendedahan itu di buat, maka kewajipan untuk berahsia tidak lagi timbul.

[Rayuan dibenarkan. Pengisytiharan yang dipohon diberikan sepertimana terpinda].

Cases referred to:
Television Broadcasts Ltd. & Ors. v. Mandarin Video Holdings Sdn. Bhd. [1983] 2 MLJ 346 ***(foll)***
Blunt v. Park Lane Hotel Ltd. [1942] 2 KB 253 ***(refd)***
Prince Albert v. Strange [1849] 41 ER 1171 ***(foll)***
Norwich Pharmacal Co. v. Commissioners of Customs and Excise [1972] RPC 743, [1974] A.C. 133 ***(refd)***
Chan Kwong Fong & Anor v. Chan Wah [1977] 1 MLJ 232 ***(foll)***
Kuluwante v. Government of Malaysia & Anor. [1978] 1 MLJ 92 ***(refd)***
Supreme General Films Exchange Ltd. v. Brijnath Singhji AIR 1975 SC 1810 ***(refd)***
Tan Sri Othman Saat v. Mohamed bin Ismail [1982] 2 MLJ 177 ***(refd)***
Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 121 ***(refd)***
lmperial Tobacco Ltd & Attorney-General [1981] AC 718 ***(refd)***
Dato Menteri Othman bin Baginda v. Dato Ombi Syed Alwi [1981] 1 MLJ 29 ***(refd)***
Blunt v. Park Lane Hotel Ltd. [1942] 2 KB 253 ***(refd)***
Lamb v. Monster [1882] 10 QBD 110 ***(refd)***
Reg. v. Boyes, 1 B. & S. 311 ***(refd)***
Television Broadcasts Ltd v. Mandarin Videos [1983] 2 MLJ 346 ***(refd)***
Reg..v. Scott [1856] Dears & B. 47 ***(refd)***
Fraser v. Evans [1969] 1 QB 349 ***(refd)***
Marcel v. Commissioner of Police [1992] Ch. 225 ***(foll)***

Legislation referred to:
Courts of Judicature Act, 1964, s. 23(l)(b)
Banking and Financial Institutions Act, 1989
Bankers Books (Evidence) Act, 1949, s. 6
Evidence Act, 1950, s. 132
Rules of the High Court, 1980, O. 15 r. 16, O. 66 and O. 39
Specific Relief Act, 1950, s. 41
Specific Relief Act, 1877 (India) (revised 1963) s. 42

Other sources referred to:
Law of Privilege, Suzanne McNicoll, 1992 edn.
Criminal Evidence in Hong Kong, Bruce & McCoy, 1987 edn.
Conflict of Laws, Dicey & Morris, 9th edn, p. 943
Halsbury's Laws of England, 4th edn, para. 406, p. 308
The Declaratory Judgment, Zamir & Woolf, 2nd edn, p. 174

Civil Appeal No. W-02-3-94
For the appellant - Alan Martin Wilson QC (Ira Biswas with him); M/s. Chooi &Co.
For the first, second & third respondents - S. Suhendran; M/s. Saheran & Woon
For the fourth respondent - Sir Michael Ogden Q.C. (B.E. Teh with him); M/s Teh & Assoc.

Civil Appeal No. W-02-9-94
For the appellant - Sir Michael Ogden Q.C. (B.E. Teh with him); M/s Teh & Assoc.
For the first, second and third respondents - S. Suhendran; M/s. Saheran & Woon
For the fourth respondent - Alan Martin Wilson Q.C. (Ira Biswas with him); M/s Chooi & Co.

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JUDGMENT

Gopal Sri Ram JCA:

These appeals, which were heard together, arise in the following way. The learned Judge in the Court below was in the process of recording evidence that is proposed to be used in criminal proceedings in Hong Kong. He was acting pursuant to an order made under O. 66 b and O. 39 of the Rules of the High Court, 1980, upon letters of request issued by the Supreme Court of Hong Kong. In the midst of carrying out that task, he was required to deal with a summons taken out by the first, second and third respondents asking for certain declarations. I will say more about this in a moment.

The first and second respondents are officers of the third respondent bank. They are potential witnesses in the proceedings before the learned Judge. They have also expressed their c willingness to give evidence before the Court in Hong Kong. But they and their employer were concerned about the resultant implications of giving evidence. They genuinely entertain a fear that by doing so they may be prosecuted for offences under the Banking and Financial Institutions Act, 1989, or "BAFIA', as that Act is commonly referred to. They are also concerned that they may become liable civilly in the event of their making disclosure of confidential information in the course of giving evidence. Before proceeding any further, I d must make mention of the fact that on 4 March 1992, the High Court had made an order under s. 6 of the Bankers Books (Evidence) Act, 1949, (referred to in the Court below as the "BBEA) requiring the first respondent to make disclosure upon a number of matters.

The apprehension operating upon the minds of the first, second and third respondents is summarised in paragraphs 10, 11, 15, 17 and 18 of the affidavit of the first respondent affirmed e on 6 May 1994, and they read as follows:

> 10. The bank was also advised that the BBEA order obtained in Malaysia would not operate to exempt the officers from any such disclosure in Hong Kong as the order would only operate in relation to the giving of evidence in these proceedings in Malaysia. Further, I am advised and verily believe that in all events, the BBEA order would only apply to exempt the officers/ the bank in relation to the disclosure of information relating to the areas covered by the BBEA f order itself.
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> 11. In view of the advice, the officers feel that they are unable to give evidence in Hong Kong. However, as the issue has, to the best of my knowledge, not been considered by the Malaysian Courts, the bank and the officers have authorised the filing of this application for a ruling by this Honourable Court.
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> 15. Depending on the reasoning of and orders made by this Honourable Court in this g application, the officers may opt to give evidence in Hong Kong. However, as matters stand it appears that the examination of the officers and other employees of the bank will take place in Malaysia.
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> 17. 1 have been advised by my solicitors and verily believe that the BBEA order will exempt the officers from any offence with respect to s. 97 (1) of BAFIA and the breach of any common law obligation of secrecy in the event of disclosure during the course of these h proceedings in Malaysia.
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> 18. However, I am further advised by my solicitors and verily believe that the BBEA order is limited in its operation and the protection will only apply to exempt the officers from their obligations of secrecy in relation to the areas set out therein. Accordingly, I believe that the examination and cross-examination of the officers should be limited to the areas set out in

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the BBEA order so as to protect the officers from committing any offence or from breaching any obligation of secrecy.

On 6 May 1994, the first to the third respondents took out a summons asking for certain declarations. I will not set them out here. The learned Judge rightly formed the view that the declarations sought were too wide. He invited the parties before him to narrow down the scope of the declarations prayed for. Counsel set about that task and produced the following compromise:

(a) We are all agreed that in the absence of an order made under s. 6 of the Banker's Books (Evidence) Act (BBEA), it is an offence, under s. 97(l) of the Banking And Financial Institutions Act and a breach of the duties of confidentiality under connnon law for the Applicant Witnesses to give evidence in Hong Kong or in Malaysia.

(b) Subject to para (i) and (ii) below which define the issues between the parties, we are all agreed that once an order is made under s.6 of the BBEA, the provisions of s. 97(l) and the duties of confidentiality under common law do not apply:

(i) whether an order made by this Court pursuant to s. 6 of the BBEA exempts the applicant witnesses from committing any offence under s.97(l) or breaching their duties of confidentiality when giving evidence in Hong Kong; and

(ii) If applicant witnesses give their evidence in Malaysia is their evidence to be restricted solely to what is contained in the letters of request, the orders made under O. 66 or the order made pursuant to s. 6 of the BBEA.

On 11 May 1994, the first and second respondents appeared before the learned Judge and expressed their readiess and willingness to appear and give evidence before the Court in Hong Kong. They repeated their concerns about giving such evidence.

When the summons came on for hearing, the learned Judge voiced his concerns about the question posed in (b) (ii). As a result, arguments were confined to the issue raised in (b) (i). After hearing argument, the learned Judge expressed the following view:

> Having considered this application and the arguments of all parties, I say, with respect, I find merit in the argument of Mr. Suhendran that the protection given by s. 6 of the Bankers' Books (Evidence) Act and s. 97(2) and s. 100 of the Banking and Financial Institutions Act would only be available to the witnesses if they give their evidence in our High Court here in Malaysia in compliance with the Court's Order under s. 6 of the earlier Act. I rule they would not have the protection of the Court if they voluntarily agree and do give evidence in Hong Kong. I say this, not even in pursuant and in compliance with a Court order here and they were to continue with that evidence in Hong Kong for the Order that gives them that protection can only operate within the territorial limits of the Court's jurisdiction not extra territorial.

The effect of this ruling, with respect, is to produce an incongruent result. It amounts to this. If the first to the third respondents give evidence upon a matter before the recording Judge in this country, they would not be either civilly or criminally liable. Again, if their depositions taken here are read out to a jury in Hong Kong, there would be no liability attached to them. Yet, if they appear in person before the very same jury and give *viva voce* evidence upon the same matters and even repeat *ipsissima verba* the very same answers given in their respective depositions, they will be liable to be sued and prosecuted. I think that it is quite illogical if such an incongruous consequence should result. In my judgment, such a result will not follow if the correct approach is adopted.

To begin with, the following matters of importance must not be forgotten: (1) The prosecution, led by the Attorney General of Hong Kong wants these witnesses to give evidence before

the Court of the Colony; (2) The defence wish to cross-examine these witnesses before a jury in Hong Kong since questions of credibility are involved; (3) The witnesses themselves are ready and willing to give evidence before the Court in Hong Kong; (4) Our Courts have, in accordance with well established principles, decided to aid the foreign Court in the gathering of evidence so as to meet the interests of justice. Accordingly, all that is done in aid of the foreign proceeding must be directed at the attachment of justice. In the present context, everything that is lawfully possible must be done to lend the witnesses such comfort as will enable them to testify freely before the foreign Court without any apprehension operating upon their minds. That is the object all before us seek to achieve. And I am most disinclined not to have the result all intend to have unless the law does not permit it. But I think that it does.

Criminal liability of which the first to the third respondents apprehend stems from the possible breach of s. 97 of the BAFIA which attracts punishment under s. 103 of the same Act. Section 97 provides as follows:

> 97. Secrecy.
>
> (1) No director or officer of any licensed institution, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.
>
> (2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.
>
> (3) No person who has any information or document which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

I think that for completeness I ought to set out s. 6 of the BBEA which reads as follows:

> Section 6: An officer of a bank shall not, in any legal proceedings to which the bank is not a party, be compellable to produce any banker's book the contents of which can be proved under this Act or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of a Judge made for special cause.

While focusing their attention on these sections, Counsel appear to have completely overlooked what I believe to be a most important statutory provision. It is s. 132 of the Evidence Act, 1950 which reads as follows:

> 132. (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.

(2) No answer which a witness shall be compelled by the Court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

(3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the Court shall explain to the witness the purport of subsection (2).

In *Television Broadcasts Ltd. & Ors. v. Mandarin Video Holdings Sdn. Bhd.* [1983] 2 MLJ 346, my learned brother Chan J, (as he then was) reviewed several authorities and, in my respectful opinion, rightly held that the effect of the section is to do away with the privilege against self-incrimination that is part of English common law. Suzanne McNicoll in her treatise on the *Law of Privilege*, (1992 edition), provides the following comprehensive statement of the rule, attributing it to the formulation of it by Lord Goddard in *Blunt v. Park Lane Hotel Ltd.* [1942] 2 ICB 253:

> It is a fundamental principle of the common law that, in civil and criminal cases, a person is not obliged to answer any question or produce any document if the answer or the document would have a tendency to expose that person, either directly or indirectly, to a criminal conviction the imposition of a penalty or the forfeiture of an estate.

As observed, s. 132 has excluded the operation of this doctrine in our jurisprudence. The section applies where a Court in this country is recording evidence in municipal proceedings or in aid of proceedings pending before a foreign tribunal. It is to be applied in this way. If a witness is asked a question the answer to which may expose him to one or more of the consequences envisaged by the section, the Court must direct the witness to answer the particular question, explaining to him that he is under compulsion to provide the answer and explain to the witness that any answer he may give cannot be used as the basis of criminal liability.

In the context of the present appeals, the first and second respondents are not excused, while giving evidence before the learned Judge from declining to answer any relevant question asked of either of them. However, once it appears to the learned Judge that the answer to any particular question may result in one or more of the consequences described in s. 132(l), he must carry out the exercise set out in subsection (3) thereof. In this way, neither the first, second nor third respondent may be held criminally liable for the answers they provide whether in examination in chief or under cross-examination.

1 cannot see that a different result would ensue if these witnesses were to give evidence in Hong Kong upon those matters covered by the letters of request. In the case of criminal liability, s. 97 of the BAFIA is not expressed to have extraterritorial effect. Therefore, a disclosure made in contravention of it cannot found the basis of crimimal liability in this country.

Even if I am wrong in the view that I have expressed about the section having no extra-territorial effect, any answer given by these witnesses before the Court in Hong Kong will be governed by the law of that colony. As I understand that law, the rule against self incrimination applies in favour of witnesses who testify in criminal proceedings. (See *Criminal Evidence in Hong Kong*, by Bruce & McCoy, 1987 edition.) It is for the Judge trying the case in Hong Kong to determine whether to compel these witnesses or either of them to answer questions put to them. And if he compels the first or second respondent or either of them to answer a particular question, then I cannot see how the provision of that answer given under legal compulsion, even in breach of s. 97 of the BAFIA, may be used to found criminal liability in this country.

I now turn to consider the existence of civil liability, if any, for disclosure of confidential information. This aspect of the case has been carefully considered by my learned brother Justice Chan, JCA in his judgrnent which I have had the benefit of reading in draft. I am in agreement with the reasons given by my learned brother for holding that no action will lie against the first to the third respondents in respect of the disclosure by any of them of confidential information made in the course of giving evidence before the learned Judge in this country.

As far as the proceedings in Hong Kong are concerned, I am of the view that the disclosure by the first or second respondent or either of them of confidential information made before a Court of that colony would not expose them or either of them to any action for breach of confidence in this country. My reasons for the view I hold now follow.

The duty to keep confidences whether of a personal or commercial nature is essentially part of equity jurisprudence, although, more recent authority supports the foundation of the doctrine on the wider concept of public interest. (See *Norwich Pharmacal Co. v. Commissioners of Customs and Exercise* [1972] RPC 743 at 746, per Lord Denning MR, reversed on other gounds in [1974] AC 133.) The doctrine protects the use or publication of one's personal or trade secrets obtained in consequence of a confidential relationship whether arising from or independent of contract: *Coco v. A.N. Clark (Enizineers) Ltd.* [1969] RPC 41, at page 46. And the doctrine extends even to strangers who come upon such confidential information: *Rex Co. v. Muirhead* [1926] 136 LT 568. at 573, per Clauson J.

Traditionally, equity regards the publication or a threat to publish or to use confidential information as a wrong. A threat to use or to publish may be restrained by an injunction. If the wrong has already been done, in the sense that the offending material has already been used or published, then, the appropriate remedy may be obtained. In a case where confidential information has been wrongly used, an account of monies earned by such wrongful use may be had. Where, however, the information has been published, then damages may be the appropriate remedy, accompanied by an injunction restraining further publication.

The juridical basis for the doctrine is to be found in the following passage in the judgment of Lord Cottenham in *Prince Albert v. Strange* [1849] 41 ER 1171 (at page 1179), a case that is generally regarded as the source of all authority upon the subject:

> Some minor points were raised at the Bar, to which I will shortly advert. It was contended, there ought not to be any injunction until the plaintiff had established his title at law; and cases were referred to, in which it was supposed I had laid down rules establishing such a proposition. The cases referred to are cases in which the equitable jurisdiction arose from some legal title, and was exercised solely for the purpose of protecting the party in the enjoyment of such legal title, and they have no application to cases in which this Court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but **to prevent what this Court considers and treats as a wrong, whether arising from violation of unquestioned right or from breach of trust, confidence or contract**, as the present case, and in the case of Mr. Abernethy's lectures. But, even in the cases so referred to, I have always held, that it was for the discretion of the Court to consider whether the defendant might not sustain greater injury from an improper injunction, than the plaintif from delay in granting it. In the present case, where the privacy is the right invaded, the postponing of injunction would be the equivalent to denying it altogether. The interposition of this Court in these cases does not depend on any legal right; and to be effectual, it must be immediate.(The emphasis is mine)

The point that emerges from *Prince Albert* (*supra*) and all the learning that has followed upon it leaves me with the impression that although breach of confidence is a wrong *sui generis,* it is by its very nature akin to tortious wrongdoing. In my judgment, in the field of private international law, for the purpose of characterisation, the principles that are to govern this wrong are the same as those which govern the commission of a foreign tort. It is to those principles that I shall now refer.

In order to render an alleged breach of confidence that occurs abroad to be actionable in this country, two conditions must be satisfied. First, it must be actionable if the particular disclosure was made in Malaysia in the same circumstances in which it was made in the foreign country. Secondly, the disclosure of the confidential information of which complaint is made must not be justifiable by the law of the countly in which the alleged breach of confidence occurred.

I derive support for the view I take of the matter from the decision of the Federal Court in *Chan Kwong Fong & Anor v. Chan Wah* [1977] 1 MLJ 232. Raja Azlan Shah FJ (as he then was), delivering the unanimous decision of the Court, reviewed the authorities and set out the applicable law with such trenchant lucidity that I think it desirable that his words be reproduced *in extenso.* This is what he said:

> It is necessary, in my view, to ascertain the rule of private international law which defines the conditions of civil liability in this country for an act done abroad. As the law stands it must be accepted that an action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been Justifiable by the law of the country where it was committed.
>
> It was Willes J who expressed the proposition some 100 years ago in *Phillips v. Eyre, supra,* a case concerning the jurisdiction of English courts in cases of foreign torts. The first branch of the statement was derived from the decision in *Liverpool, Brazil, and River Plate Steam Navigation Co. Ltd v. Banham (The Halley)* although in that case the Privy Council held that the defendant was not liable in England for an act done abroad by another defendant, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was liable according to English law. This branch of Willes J's statement of the law is free from ambiguity. It is the second branch of his statement, expressed by the phrase "not justifiable", that has provoked criticism. The respondent claimed that he needed only to establish the first branch of the rule, not the second. In other words, it is said in order to found jurisdiction in respect of a foreign tort, a plaintiff need only prove that the wrong is of such a character that it is actionable according to the *lex fori,* and if that is established, then it is for the defence to show that the wrong is justified by the *lex loci delicti,* relying on the words of Rigby LJ in *Machado v. Fontes:*
>
> > I think there is no doubt at all that an action for a libel published abroad is maintainable here, *unless it can be shown to be justified or excused in the country where it was published;*
>
> a negative averment, thus falling on the defence to establish it.
>
> *Machado v. Fontes* has been the subject of much criticism ever since its birth. It has been followed in Canada, doubted in the Privy Council, severely criticised in Australia, and not followed in Scotland, where it has long been settled law that "not justifiable" means "actionable". It has also been severely criticised by academic writers (see *Dicey & Morris* in the Conflict of Laws, 9th edition, page 943). In *Machado v. Fontes* it was held that if the act was contrary in any respect to the law of that country, then, although it gave rise to no civil liability there, it was not justifiable there, and the second branch of the rule was therefore not established. The High Court in Australia in *Koop v. Bebb* rejected *Machado v. Fontes* saying that

decision went too far. The House of Lords in *Boys v. Chaplin, supra,* at page 377 overruled *Machado v. Fontes.* Lord Hodson dealt with the matter in the following words:

> If the decision in *Machado v. Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled.

In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such, only if it is both actionable as a tort in this country as well as in the country where it was done. It is here we must be careful to consider two separate issues - jurisdiction and the choice of law, for they are locally distinct and separate. Windeyer J in *Anderson v. Eric Anderson Radio & TV Pty. Ltd.* puts the matter succinctly in this passage:

> When in *Koop v. Bebb* this Court spoke of 'the rule of private international law which defines the conditions of civil liability in one State for an act done in another, the reference was not, as I read the judgment, merely to the entertaining of an action but also to the substantive law for determining liability in an action.

Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive - the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain.and suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by the *lex fori.* (See the speech of Lord Hodson in *Boys v. Chaplin, supra,* at pages 378, 379).

Accordingly our Courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction *in personam* over the defendant. That is clearly stated in *Halsbury's Laws of England*, 4th edition, paragraph 406, page 308:

> In general, the English Court has jurisdiction in actions in personam against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases the Court may make an order for substituted service, or for service outside the jurisdiction.
>
> The parties may by their conduct give the English Court a jurisdiction which it would not otherwise possess. By coming to the English Court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English Court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to the mode and place of service.

See also r. 20, r. 21, *Dicey & Morris, Conflict* of Laws, 9th edition.

Section 23(l)(b) of the Courts of Judicature Act, 1964 is declaratory of this rule. It enacts *(inter alia),* that:

> ...the High Courts shall have jurisdiction to try all civil proceedings where the defendant or one of several defendants or has his place of business...within the local jurisdiction of the Court.....

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. It is here, in my view, the respondent has to establish both the conditions laid down in *Phillips v. Eyre. Dicey & Morris* in their *Conflict of Laws*, 9th edition, rule 178, supports this view; so also *Halsbury's Laws of England*, 4th edition, paras. 615-620.

Returning to the case at hand, it is clear that any action brought by a putative plaintiff against the first to the third respondents complaining about the latter's disclosure of confidential information before the Courts of Hong Kong is doomed to failure because any such plaintiff will be unable to satisfy the first requirement alluded to by his Lordship in *Chan Kwong Fong (supra).* Put simply, it cannot be established in any such action as postulated that the disclosure complained of if made here will be actionable under the *lex fori.* That is because any such disclosure, if made in this country in similar circumstances, would not, for the reasons appearing in my learned brother Justice Chan's judgment, expose the first to the third respondents to civil liability. Since the respondent witnesses as well as the respondent bank will not be liable under the *lex fori,* it matters not a jot whether they or any of them may be liable under the *lex loci delicti.*

That brings me to the next issue. Can this Court grant the declaratory relief sought for? Further, even if we could, ought this Court exercise its discretion and grant the declarations asked for? Upon both these questions Mr. Wilson of Counsel for the Attorney General of Hong Kong and Sir Michael Ogden for the appellant George Tan stand on common ground maintaining that this Court has jurisdiction to declare the law of this country. They also are agreed that discretion ought to be exercised in favour of the grant of a declaration. I think that Counsel are correct in both arguments.

Now, the jurisdiction of a Malaysian Court to grant declaratory relief springs from two sources. First there is the statutory basis to be found in s. 41 of the Specific Relief Act, 1950 which reads as follows:

> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any ftuther relief :
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> *Explanation* - A trustee of property is a "person interested to deny"' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

The procedural adjunct to the statutory basis is to be found in O. 15 r. 16 of the Rules of The High Court, 1980, which provides as follows:

> 16. No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

The alternative basis for the grant of declaratory relief - a jurisdiction of great antiquity - is the inherent jurisdiction of the Court: *Kuluwante v. Government of Malaysia & Anor.* [1978] 1 MLJ 92. It has long been recognised by Indian Courts administering their Specific Relief Act, 1877 (later revised and re-enacted in 1963) that s. 42 of that enactment, which is identical to s. 41 of our statute is not a complete code upon the subject of declaratory decrees.

In *Supreme General Films Exchange Ltd. v. Brijnath Singhji* AIR 1975 SC 1810, Beg J, explained the scope of the declaratory jurisdiction in these words:

> *Kishori Lal's* case (AIR 1952 Punj 387) (*supra*) was cited to show that declaratory decrees falling outside s. 42 of the Specific Relief Act are not permissible because s. 42 Specific Relief Act is exhaustive on this subject. This view must be held to have been rejected by this Court

when it declared in *Vemareddi Ramaraghava Reddy v. Konduru Seshu Reddy* [1966] SCR Supp. 270 at 277, [1967] AIR SC 436 at 440.

> In our opinion, s. 42 of the Specific Relief Act is not exhaustive of the cases in which a declaratory decree may be made and the Courts have power to grant such a decree independently of the requirements of the section. It follows, therefore, in the present case that the suit of the plaintiff for a declaration that the compromise decree is not binding on the deity is maintainable as falling outside the purview of s. 42 of the Specific Relief Act.
>
> The result is that s. 42 merely gives statutory recognition to a well-recognised type of declaratory relief and subjects it to a limitation, but it cannot be deemed to exhaust every kind of declaratory relief or to circumscribe the jurisdiction of Courts to give declarations of right in appropriate cases falling outside s. 42.
>
> We think that the circumstances in which a declaratory decree under s. 42 should be awarded is a matter of discretion depending upon the facts of each case. No doubt a complete stranger whose interest is not affected by another's legal character or who has no interest in another's property could not get a declaration under s. 42 Specific Relief Act with reference to the legal character or the property involved.

The Federal Court in *Tan Sri Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 cited and applied the decision of the Indian Supreme Court in *Supreme General Films Exchange Ltd*. (*supra*) and in other Indian cases. The relevant passage reads as follows:

> It will be necessary at the outset to consider the scope of the power to grant declaratory orders and judgments. Chapter VI of the Specific Relief Act, 1950 deals with declaratory decrees and s. 41 thereof provides for the discretion of the Court as to declarations of status or right. Section 41 of the Specific Relief Act was textually adopted *totidem verbis* from s. 42 of the Indian Specific Relief Act, 1877 (now s. 34 of the Indian Specific Relief Act, 1963), and on an application of the law enunciated by the Privy Council and the Supreme Court of India in relation to the equivalent provisions in the Indian Specific Relief Act and Civil Procedure Code, s. 41 of the Specific Relief Act gives statutory recognition to a well recognised type of declaratory relief and subjects it to a limitation but it cannot be deemed to exhaust every kind of declaratory relief or to be the jurisdiction of the Courts to give declarations of right in appropriate cases falling outside it. The Court has power to grant such a decree independently of the requirements of the section, and such a declaration outside the purview of this statutory enactment will be governed by the general provisions of O. 15 r. 16 of the Rules of the High Court, 1980 which will then apply [*Supreme General Films Exchange Ltd v. His Highness Maharaja Sir Brijath Singhji Deo of Maihar &* Ors., following *Vemareddi Ramaraghava Reddy & Ors. v. Konduru Seshu Reddy & Ors.* relying on the decisions of the Privy Council in *Fischer v. Secretary of State for India in Council* and *Partab Singh v. Bhabuti Singh.*]

While I cannot possibly agree to the reference to O. 15 r. 16 as providing a jurisdictional basis [see *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12], I respectfully agree with the proposition that s. 42 is not exhaustive and does not constitute the sole jurisdictional basis for the grant of declaratory relief.

The next point that falls to be considered is whether discretion ought to be exercised in favour of the appellants. Before dealing with this aspect of the case, it is necessary to state the principles on which this Court will interfere with a decision of the High Court arrived at in the exercise of a discretion vested in it. In an appeal such as the present, where relief is granted or withheld in the exercise of discretion, the initial function of the Court of Appeal is one of review only. It is only after an appellant has demonstrated to a conviction that the High Court erred in principle or that it took into account irrelevant considerations or failed to take into account relevant considerations or that the decision has occasioned a miscarriage

of justice that this Court becomes seised of an original discretion of its own. The instant case is one which falls within those categories in which this Court may exercise an original discretion. But, as I have earlier said, ought that discretion to be exercised in favour of the appellants? I think that it should. And my reasons for the view I hold are as follows.

It cannot be gainsaid that part of the declaration relates to the question whether the future course proposed by the first to the third respondents is criminal. It will be recalled that these respondents fear that they may be later held to have committed an offence under the BAFIA.

Now, there is no rule prohibiting a Civil Court from declaring that particular conduct is not criminal in nature. Historically, as a matter of discretion, such declarations were not granted because they do not bind a Criminal Court. And no Court will act in vain by granting meaningless declarations. The true ambit of the discretion is explained in *Zamir & Woolf on The Declaratory Judgment*, 2nd Edition, page 174 et seq., and I can do no better than to quote the words of the learned authors of that treatise:

> **The strict approach to criminal proceedings** Where it is doubtful whether particular conduct involves the commission of a criminal offence, it would be very convenient to be able to ascertain whether or not the conduct is in fact criminal by obtaining a ruling of the High Court in the form of a declaration. Indeed the ability to do so could avoid the unintentional commission of crimes and result in greater respect for the criminal law. However, the Civil Courts are reluctant to grant declaratory relief when this involves determining whether particular conduct amounts to a crime because the grant of a declaration could result in conflict between the civil and criminal Courts, with the civil Courts usurping the proper role of the criminal Courts.
>
> If criminal proceedings, properly instituted, are neither vexatious nor an abuse of the process of the criminal Court, it will not normally be a proper exercise of the Court's discretion to grant the accused a declaration that the facts alleged by the prosecution do not in law establish the offence charged. This was made clear by the House of Lords in *Imperial Tobacco Ltd. & Another v. Attorney-General,* Lord Fraser alone recognising that a declaration might possibly be granted in some very special circumstances. In that case, the Director of Public Prosecutions had laid an information against the company alleging that it was distributing tickets in an unlawful lottery contrary to s. 2(l)(b) of the Lotteries and Amusements Act 1976 and conducting an unlawful competition contrary to s. 14(l)(b). The Director indicated to the company that he was proposing to proceed by indictment in the Crown Court but before the trial it issued an originating summons in the Commercial Court seeking a declaration that its conduct, constituting part of a sales promotion campaign, was lawful. In the commercial Court, the Attomey-General at first contended that the Court had no jurisdiction to grant the declaration but later conceded the issue of jurisdiction and opposed the summons on the grounds of the Court's discretion.
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> What was the proper issue was made clear in the speech of Lord Lane:
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> > 'There is no doubt that there is jurisdiction to grant a declaration in these circumstances. Anyone is on principle entitled to apply to the Court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication: *Pyx Granite Company Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260 and *London Borough of Ealing v. Race Relations Board* [1972] AC 342. There was no such prohibition here; but was the learned Judge right to exercise his discretion as he did, as the Court of Appeal thought he was?'
>
> The answer of the House of Lords was "No."
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> In justifying their restrictive approach to the grant of declaratory relief, their Lordships emphasised the technical point that, if a declaration were to be granted, it would not bind the Criminal Courts. In reality, of course, the Criminal Courts would invariably follow any decision of the High Court even if they were not bound to do so.

a **However, where criminal proceedings have been instituted, then the criminality or lawfulness of future conduct can more readily be the subject of declaratory relief although Viscount Dilhorne stated in Tobacco case, "it would be a very exceptional case in which it would be right to grant such a declaration."** Such an exceptional case was *Airedale N.H.S. Trust v. Bland.* In that case a declaration was granted that the Trust could lawfully discontinue life sustaining treatment to a patient who was in persistent vegetative state, although it was argued the withdrawal of treatment would be murder.

b In the present case, unlike *lmperial Tobacco Ltd & Attorney-General* [1981] AC 718, criminal proceedings have not been instituted against the relevant respondents. When one is considering discretionary remedies, it is particularly unhelpful to attempt a delineation of the ambit of discretion by resort to such terms as exceptional" or "very exceptional". Each case depends upon its own facts and to describe a case as "exceptional" or "very exceptional"
c helps only to cloud the true issue, which is, whether there are factors weighing in favour of granting the relief. It is, of course, quite proper to say that, in keeping with a settled practice of the Court, discretion will be exercised in a particular way if certain facts are established.

In *Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1970] AC 1136, a case concerning declaratory relief, Lord Diplock expressed the true principle in words that merit recollection:

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> When considering an action claiming relief in the form of discretionary remedies only it is thus important to distinguish between the jurisdiction of the Court to entertain the action at all, i.e. to embark upon the inquiry whether facts exist which would entitle the Court to grant the relief claimed, and a settled practice of the Court to exercise its discretion by withholding the relief if the facts found to exist disclose a particular kind of factual situation. **The application of a discretion to refuse relief even though this may be pursuant to a settled**
e **practice is an exercise of jurisdiction, not a denial of it.**

This passage was cited with approval and applied by our Federal Court in *Dato Menteri Othman bin Baginda v. Dato Ombi Syed Alwi* [1981] 1 MLJ 29.

1 have, earlier in this judgment, adverted to the various considerations operating upon this case. If discretion is exercised against the appellants it would produce an unjust result. The
f prosecution and the defence in the Hong Kong proceedings would be deprived of presenting relevant evidence before the jury. That in itself is a compelling reason to exercise discretion in favour of the appellants.

The appeal was accordingly allowed and by consent of Counsel it was ordered that there be no order as to costs. Since the form of the declaration sought by the parties was found to be too wide, Counsel at our request redrafted the declaration sought. A declaration was made
g in the following terms:

> **This Court Doth Declare** that if the first and second respondents in these consolidated appeals give evidence or disclose information or documents concerning the affairs or accounts of Bank Bumiputra Malaysia Berhad, Bumiputra Malaysia Finance Limited or their customers, in Hong Kong in the trial of *R v. George Tan*
h *Soon Gin,* they will not be committing any offence under Malaysian Law, nor will they be liable to civil proceedings in respect thereof provided that any such evidence or disclosure is confined to matters and topics raised in any letter of request in these proceedings and relevant cross-examination.

i

N.H. Chan JCA:

The common law rule against self-incrimination was stated by Goddard LJ in *Blunt v. Park Lane Hotel Ltd.* [1942] 2 KB 253, 257 thus:

> the rule is that no one is bound to answer any question if the answer thereto would, in the opinion of the Judge, have a tendency to expose the deponent to any criminal charge, penalty, or forfeiture which the Judge regards as reasonably likely to be preferred or sued for. This rule was laid down by the Queen's Bench in *Reg. v. Boyes*, 1 B. & S. 311, and the words in which I have stated are those of Stephen J in *Lamb v. Monster* [1882] 10 QBD 110.

Goddard LJ acknowledged that he had adopted the words of Stephen J in *Lamb v. Monster* [1882] 10 QBD 110. This is what Stephen J said (112, 113):

> the privilege extends to protect a man from answering any question which "would in the opinion of the Judge have a tendency to expose the witness, or the wife or husband of the witness, to any criminal charge": Stephen's Dig. of the Law of Ev. 3rd ed. art. 120, p. 121.

It will be seen that the privilege applies to not answering to the questions put to the witness. This is how Stephen J put it (113):

> The extent of the privilege is I think this: the man may say, "If you are going to bring a criminal charge, or if I have reason to think a criminal charge is going to be brought against me, I will hold my tongue. Prove what you can, but I am protected from furnishing evidence against myself out of my own mouth.

In *Reg. v. Boyes*, 1 B. & S. 311; 121 ER 730, Cockburn CJ said (329, 330):

> that, to entitle a party called as a witness to the **privilege of silence,** the Court must see, from the circumstance of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. ... a Judge is in our opinion, bound to insist on a witness answering unless he is satisfied that the answer will tend to place the witness in peril. (the emphasis is mine)

In *Boyes's* case, the privilege against self-incrimination is referred to in the report as the privilege of a witness in not answering, the privilege of silence and the privilege of not answering.

The privilege against self-incrimination is a rule of the common law. In this country, s. 132(1) of the Evidence Act 1950 has abolished the privilege: see *Television Broadcasts Ltd v. Mandarin Videos* [1983] 2 MLJ 346; [1984) FSR 111. In *Reg..v. Scott* [1856] Dears & B. 47; 169 ER 909, Lord Campbell CJ said (59):

> the defendant's Counsel relies upon the great maxim of English law *"nemo tenetur se ipsum accusare."*So undoubtedly says the common law of England. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. ... The maxim of the common law therefore has been overruled by the Legislature.

In Malaysia the legislature has taken away the privilege of not answering on the ground of self-incrimination, so that, a witness in this country cannot refuse to answer to the questions put to him. This is what s. 132 of the Evidence Act 1950 says:

> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture

> of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the Court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.
>
> (3) Before compelling a witness to answer a question which will criminate or may tend directly or indirectly to criminate him the Court shall explain to the witness the purport of subsection (2).

Subsection (1) has abrogated the privilege. It says that a witness is obliged to answer any question put to him in any civil or criminal proceeding which is relevant to the matter in issue and that he cannot refuse to answer on the ground of self-incrimination. By this subsection, a witness is bound to answer any relevant question put to him whether in examination in chief, cross-examination or re-examination.

By subsection (2) any answer by which a witness is compelled by the Court to give will not subject him to arrest, prosecution or be used against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.

Subsection (3) merely says that the Court, before compelling the witness to answer, has to explain to him what subsection (2) means and it is that his answers, even though they may incriminate him, will not subject him to arrest or prosecution or be used against him in any criminal proceeding.

By giving evidence before a Judge in this country under the letters of request, the witness is protected by s. 132(2) from arrest or prosecution for his answers which are inadmissible as evidence against him in criminal proceedings. It follows from this that those answers which have been protected under s. 132(2), if repeated in a Court of the country which had issued the letters of request, would be similarly protected as though the evidence was taken in this country. This is because those answers had originated in this country where the protection afforded by the subsection applies. It also follows that such protection would extend to answers obtained under cross-examination.

Although a witness can be compelled by the Court to answer to the questions put to him even though the answers "will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person," he will only be protected under subsection (2) from arrest or prosecution or his answers being used in criminal proceedings brought against him. Section 132(2) does not protect him from his answers being used against him in civil proceedings. This is how it was put by Lord Campbell CJ in *Reg. v. Scott* (60):

> When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment.

In this country, s. 132(2) expressly protects the witness from the consequences of giving incriminating evidence in criminal proceedings only. There is no protection from the consequences of giving such evidence in civil proceedings.

"When the Legislature compels parties to give evidence accusing themselves," as has been done by s. 132(1) of the Evidence Act, the witness cannot even object to his answers being

used against him on the ground that they were not given voluntarily. See *Reg. v. Scott* in which Lord Campbell CJ said (58, 59):

> The next objection is, that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding. Then the defendant's counsel objects that, in the course of this examination, threats were used; the alleged threats, however, were merely an explanation of the enactment of the legislature upon the subject, and a warning to the defendant of the consequences which, in point of law, would arise from his refusing to give a true answer to the questions put to him.

Such an objection, that is to say, the giving of a true answer to the questions put to him was extracted under compulsion and therefore inadmissible as a confession, cannot apply to a lawful examination in the course of a judicial proceeding where the question was lawful and the party examined was bound by law to answer it. Lord Campbell CJ said it in this way (59):

> This Act of Parliament, 12 & 13 Vict. c. 106, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may shew that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law therefore has been overruled by the Legislature, and the defendant has been actually compelled to give and has given answers, shewing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact, and at the trial he was not called upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it.

The answers are therefore admissible in civil proceedings brought against the witness. However, in the instant case, since those answers are not going to be of a kind or nature that will admit of any personal liability either in contract or in tort against the witnesses, there is therefore no risk of any civil proceeding being brought against the witnesses because of those answers.

But what if an action is brought against the witnesses in this country for breach of confidence for the disclosures made in their answers to the Court which the witnesses were bound by law to furnish? It is a defence to such an action that there was just cause or excuse for the disclosure: see *Fraser v. Evans* [1969] 1 QB 349. This is what Lord Denning MR said (362):

> "The Sunday Times" say that in any event they have just cause or excuse for publishing. They rely on the line of authority from *Gartside v. Outram* (1856) 26 LJ Ch.113 to the latest case, *Initial Services Ltd. v. Putterill* (1968] 1 QB 396; (1967] 3 WLR 1032; [1967] 3 All ER 145, C.A. They quote the words of Woods V. C. that (26 LJ Ch.113, 114), "there is no confidence as to the disclosure of iniquity." I do not look upon the word "iniquity" as expressing a principle. It is merely an instance of just cause or excuse for breaking confidence.

The witnesses in the present case have legitimate excuse or reason for breaking confidence because at the time when the questions were put to them, they were bound by law, namely, s. 132(1) of the Evidence Act, to make the disclosures. See *Marcel v. Commissioner of Police* [1992] Ch. 225 where the English Court of Appeal held that the police, in response to the order of the Court represented by the subpoena *duces tecum* duly issued, were bound to

produce in Court the plaintiffs' documents seized by them, and that, therefore, the Vice-Chancellor's order setting aside the subpoena on the police would be set aside. Dillon LJ said (256, 257):

> the powers the police have to use seized documents for the purposes indicated by the Vice-Chancellor do not, in my judgment, absolve the police from the duty which police officers share with every other citizen to obey the orders of the courts in civil proceedings and in particular to obey subpoenas duly served upon them.

He then went on to say (257):

> if it be ... correct ... to say that, because the police officer siezes documents under the Act of 1984 for limited purposes, therefore he owes a duty of confidence to the owner not to use the documents for other purposes, the duty, created by the law, cannot and should not absolve him from having to obey the law if required by process of law to produce the documents in Court.
>
> In my Judgment, the true view is that the police officer is, like anyone else, and as the Commissioner of Police of the Metropolis concedes, amenable to produce on subpoena any documents in his possession, subject to the true owner having the right to challenge the subpoena, or the production of the documents, on any of the grounds on which a subpoena can be challenged. This would of course include, as is conceded, the ground of legal professional privilege in favour of the true owner. But **it would not include any such grounds of confidentiality as between the police and the true owner,** or abuse of power as have been suggested; it is not an abuse of power for a police officer to obey an order of a civil Court of competent jurisdiction. (the emphasis is mine)

And this is what Nolan LJ said (261):

> The statutory powers given to the police are plainly coupled with a public law duty. The precise extent of the duty is, I think, difficult to define in general terms beyond saying that the powers must be exercised only in the public interest and with due regard to the rights of individuals. In the context of the seizure and retention of documents, I would hold that the public law duty is combined with a private law duty of confidentiality towards the owner of the documents. The private law duty appears to me, as it did to the Vice-Chancellor, to be of the same character as that which formed the basis of the House of Lords decision *in Attorney-General v. Guardian Newspapers Ltd (No.2)* [1990] 1 A.C. 109. It arises from the relationship between the parties. It matters not, to my mind, that in this instance, so far as the owners of the documents are concerned, the confidence is unwillingly imparted. My disagreement with the Vice-Chancellor, as I have indicated, stems from my belief that the duty of confidence in circumstances such as those of the present case is outweighed by the requirements of a subpoena.

There is no duty of confidence where the disclosure is made in obedience to the law which required it to be made. In the present case, the duty of confidence is outweighed by the requirements of s. 132(1) of the Evidence Act 1950.

For the reasons which I have stated in this judgment, I agree with my Lord Sri Ram JCA in allowing these appeals which were heard together and granting the declaration sought by the parties in the modified form as appears in the judgment of my Lord.

Siti Norma Yaakob JCA:

I have had the opportunity of reading the draft judgments of my brothers, Gopal Sri Ram, JCA and N.H. Chan, JCA and I concur with the reasons as stated by them when allowing this appeal and granting the declaration on terms that had been agreed to by all the parties in these proceedings.